

STATE OF ALASKA ET AL.

IBLA 78-424, etc.

Decided August 16, 1979

Appeal from decisions of the Alaska State Office, Bureau of Land Management, holding for approval applications for Native allotments and holding for rejection various State selections to the extent of any conflict with the allotment applications.

Set aside and remanded.

1. Alaska: Native Allotments – Rules of Practice: Appeals: Generally – Rules of Practice: Appeals: Statement of Reasons

The relaxed procedural rules relating to the filing of statements of reasons for appeal in Native allotment cases enunciated in the letter of Sept. 24, 1975, and extended in the order of Nov. 26, 1976, IBLA 76-715, are hereby revoked. All future requests for extensions of time must comport with the regulations found at 43 CFR 4.22(f)(2).

2. Alaska: Native Allotments – Rules of Practice: Appeals: Generally – Rules of Practice: Appeals: Notice of Appeal

Where, in a decision holding a Native allotment for approval and a State selection for rejection to the extent of a conflict, the Bureau of Land Management grants the State 30 days to initiate a private contest challenging the Native allotment, the 30-day appeal period will commence upon expiration of the 30 days accorded the State for initiation of a private contest and not with receipt of the decision.

3. Alaska: Land Grants and Selections: Generally – Alaska: Native Allotments – Appeals – Contests and Protests: Generally – Rules of Practice: Government Contests – Rules of Practice: Private Contests

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from an interlocutory decision which authorizes the State to initiate private contest proceedings to prove lack of qualification on the part of the Native. Rather, it may initiate the private contest within the time period prescribed, or it may appeal the decision of BLM, after it becomes final, to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the patent issued, if all else be regular.

4. Alaska: Land Grants and Selections: Generally – Alaska: Native Allotments – Appeals – Contests and Protests: Generally – Rules of Practice: Appeals: Generally

Where it appears that a party did not realize that an election of remedies was mandated by Departmental procedures, a decision requiring the initiation of a private contest will be set aside, and the party will be permitted a period of time in which to initiate a private contest, or alternatively, waive such private contest and pursue a direct appeal on the question of whether a Government contest should issue.

APPEARANCES: Thomas E. Meacham, Esq., Assistant Attorney General, State of Alaska, for the State of Alaska; Alaska Legal Services Corporation for Native allotment applicants.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The State of Alaska has appealed from various decisions ^{1/} of the Alaska State Office, Bureau of Land Management (BLM), holding for approval applications for Native allotments made pursuant to the Act of May 17, 1906, 34 Stat. 197, as amended (hereinafter the Alaska Native Allotment Act), and holding for rejection various State selections made pursuant to the Alaska Statehood Act, 72 Stat. 339, as amended (48 U.S.C. Chap. 2 (1976)), to the extent of any conflict with the allotment applications.

In each of the cases, the State was given 30 days from receipt of the decision to initiate a private contest pursuant to 43 CFR 4.450 challenging the applicant's compliance with the use and occupancy provisions of the Alaska Native Allotment Act, supra. ^{2/} Under the decisions, failure to initiate a private contest would "result in the Native allotment being approved and the State selection being rejected" to the extent of any conflict. The decisions noted that "this action will become final without further notice."

The BLM decisions also contained a standard appeals paragraph, to the following effect: "In accordance with the regulations in 43 CFR 4.400, the State of Alaska has the right of appeal to the Board of Land Appeals."

In a number of the cases involved herein, the State of Alaska filed a notice of appeal within 30 days of receipt of the BLM State Office notice. In others, the State of Alaska filed notices of appeal after the running of the 30 days, but within the succeeding 30-day period. In these latter cases, the Alaska State Office dismissed the appeal as untimely. Because of the functional similarities in the various cases they have been consolidated for decision.

[1] Before examining the actions of the BLM State Office, we wish to comment on one additional aspect of many of the cases before us. In a number of cases, the State of Alaska has filed no statement of reasons for appeal. Under the applicable regulation 43 CFR 4.402, the appeals of the State in such cases are subject to summary dismissal.

It seems reasonably clear that the State was relying upon the relaxed procedural standards which this Board has applied to Native allotment appeals over the past 4 years. This standard was initiated by a letter of September 24, 1975, from the Chief Administrative Judge, Interior Board of Land Appeals (IBLA), to the various offices

^{1/} See appendix for the list of cases involved.

^{2/} In IBLA 78-66, the State was given 60 days to initiate a private contest.

of the Alaska Legal Services Corporation, (ALSC). In that letter, the Chief Administrative Judge enunciated the following policy with regard to appeals by Alaska Native allotment applicants from decisions rejecting their applications:

The Board will not consider any appeal relating to an Alaska Native allotment applicant until at least 60 days after the filing of the notice of appeal. The Board will accept and consider a statement of reasons in support of an appeal at any time before a decision is reached. No appeal by an Alaska Native will be dismissed summarily for failure to submit a statement of reasons in support of his appeal. Each case will be decided on the merits of its record before this Board.

While this letter, by its terms, applied to appeals submitted "by an Alaska Native," the Board, in an order of November 26, 1976, entered in State of Alaska v. Lawrence, IBLA 76-715, held that inasmuch as it would not dismiss an appeal for an untimely filing of a statement of reasons where the allotment applicant was late, it would be discriminatory not to grant the same privileges to a party whose interests were adverse to a Native allotment applicant.

The animating rationale for these relaxed rules is easily discerned. At the time that the letter of September 24, 1975, was issued no hearings were being held prior to the rejection of Native allotment applications. As a practical matter, it was only upon the receipt of a notice of rejection that an allotment applicant sought counsel, who would normally immediately file a protective notice of appeal. Upon receipt of the notice of appeal, however, the BLM State Office would transmit the case file to the Board. Thus, when the applicant's attorney attempted to review the case record, he or she would be informed that it had been sent to the Board. The attorney would then file a request that the case file be returned to Alaska so that the attorney might be afforded an opportunity to review it. Eventually, the Board became involved in the wholesale transshipment of case files to Alaska, with the extensive delays in adjudication which were concomitant thereto.

To remedy this situation, the Chief Administrative Judge had earlier, on May 2, 1975, requested that the BLM State Office not transmit the case files, provided that attorneys of ALSC filed, with the notice of appeal, a request that the files be retained in Alaska for a reasonable time to allow counsel to examine the record. While this procedure alleviated the problem of transshipment of case files, it generated a different problem for the Board.

Since the statement of reasons was required, under the Board's procedural regulations, to be filed within 30 days, ALSC was normally

required to request an extension of time. The difficulty arose from the fact that since the BLM State Office was retaining the case files, the Board would have no record of any of the cases for which extensions were sought. This situation proved totally unacceptable to everyone involved and led, in a few instances, to the erroneous dismissal of appeals. See Order of August 22, 1975, IBLA 75-437, etc., Roselyn Isaac et al. The letter of September 24, 1975, was directed to this problem.

Since that time, however, much has changed in the adjudication of Native allotment applications. Under the procedures adopted by this Board in Donald Peters, 26 IBLA 235 (1976), reaffirmed on reconsideration, 28 IBLA 153, pursuant to the decision of the Ninth Circuit Court of Appeals in Pence v. Kleppe, 529 F.2d 135 (1976), no Native allotment application may be rejected absent notice and an opportunity for hearing on disputed issues of fact. Except for the sole exception where an adverse party waives its right to bring a private contest and directly appeals to this Board for its review (see State of Alaska, 41 IBLA 309 (1979), and discussion infra), all initial determinations of factual disputes will be made by an administrative law judge after notice and hearing. Moreover, even in circumstances where an adverse party does elect to waive initiation of a private contest and seek direct review before the Board, the Native allotment applicant will receive notice of the appeal, with an opportunity to file an answer in response to the adverse party's statement of reasons for appeal. ^{3/} Should the Board determine that a Government contest complaint should issue, the allotment applicant would be afforded notice and an opportunity for hearing before an Administrative Law Judge and could appeal an adverse decision to the Board. Thus, the procedural difficulties and the concern that the applicant's attorney might not have a full opportunity to adequately represent the applicant no longer obtain.

Accordingly, the relaxed procedures announced in the letter of September 24, 1975, and extended by the Order of November 27, 1976, IBLA 76-715, are hereby revoked in futuro. All cases presently pending before the Board will be adjudicated pursuant to the former guidelines. All future appeals, however, must comport with the procedures set out in the Department's appellate regulations. The Board has traditionally been most generous in granting extensions of time. It intends to continue this policy. But all requests for extensions must, as the regulation requires, be filed "within the time allowed for the filing or serving of the document and must be filed in the same office in which the document in connection with which the extension requested must be filed." 43 CFR 4.22(f)(2).

^{3/} We would note further that failure to file an answer to a statement of reasons does not result in a default. 43 CFR 4.414.

[2] In reference to those cases in which the State filed its notice of appeal after the expiration of the time in which the State was afforded an opportunity to initiate a private contest, the State argues that the appeal period began when the decision became "final." The BLM decision, "by its terms," did not become final "until the 30th day after its receipt."

The BLM decision notified the State that it had 30 days to initiate a private contest challenging appellee's use and occupancy. BLM had determined that the allotment applicant had complied with the provisions of the Alaska Native Allotment Act, supra, and that the application should be approved and the State selection rejected. The effect of this decision was suspended pending the State's decision whether to initiate a private contest within the 30-day period. This opportunity accorded the State to participate prior to resolution of the central issue of use and occupancy fully comports with our decision in John Nusunginya, 28 IBLA 83 (1976), where we allowed the State the right to intervene in a Government contest proceeding on the same issue. See also State of Alaska, 40 IBLA 79 (1979); Natalia Wassilliey, 17 IBLA 348 (1974).

BLM's notification of the State's right to a private contest was interlocutory in nature and an appeal within the 30-day period should have been so treated. State of Alaska, 41 IBLA 309 (1979). The primary question before BLM, appellee's entitlement to an allotment, had not been finally resolved. Cf. Elko County Board of County Supervisors, 29 IBLA 220 (1977); Carl Wittman, 16 IBLA 188 (1974); Anna A. Madros, 7 IBLA 323 (1972). Thus, it was error for the BLM State Office to include an appeals paragraph.

The 30-day appeal period commenced upon expiration of the 30 days accorded the State for initiation of a private contest and not with receipt of the BLM decision. Accordingly, the State's notice of appeal was timely filed.

[3] As regards those cases in which the State of Alaska appealed within the 30 days in which they could initiate a private contest, we note that the decision was interlocutory in nature and not subject to appeal at that time. See State of Alaska, 41 IBLA 309 (1979). Upon notification by the State Office that it intends to grant the Native allotment and reject a state selection to the extent of any conflict, the State of Alaska is required to make an election of remedies. It may initiate a private contest within the terms of the decision; or it may permit the decision to become final waiving its right to bring a private contest and appeal to this Board for a determination whether a Government contest complaint should issue against the allotment.

See State of Alaska, 41 IBLA 309 (1979); John Nusunginya, *supra*. In accord with our decision in State of Alaska, all such appeals are hereby dismissed as interlocutory, but the State is afforded 65 days herefrom in which to file private contest complaints in any of the subject cases. If no appeal is filed, the decisions of BLM will become final as of the expiration of 65 days. Within the succeeding 30 days the State may then file an appeal to the Board directed solely to the question of whether a Government contest complaint should issue. ^{4/}

[4] In those cases in which the State of Alaska filed a notice of appeal after the 30 days in which a private contest could be initiated, we will set aside the original decision. ^{5/} These appeals were filed prior to the issuance of the decision in State of Alaska, 41 IBLA 309 (1979), wherein the Board clearly delineated the election of remedies which the State could make. Inasmuch as the State was unaware that an election of remedies was mandatory, we will afford the State a period of 35 days from this decision in which to file a private contest complaint in such cases. At the expiration of 35 days, the decision of BLM will become final and the State may take a timely appeal to the Board directed solely to the question of whether a Government contest complaint should issue.

^{4/} The fact that the decision contained the standard appeals paragraph is of no effect. This Board has the exclusive power to decide who may or may not appeal to it, and the inclusion or omission of the appeals paragraph is not controlling upon the Board's determination. See generally, Fancher Brothers, 33 IBLA 262 (1978); Frank and Rene Lock, IBLA 76-608, Order of May 20, 1977. The BLM Manual expressly notes: "A decision may neither grant the right [of appeal] where it does not exist nor withhold it where it does." BLM Manual 1841.15.

^{5/} In the following cases, the State of Alaska filed the notice of appeal after the expiration of the time for initiating a private contest: IBLA 78-134, Edward M. Stevenson; 78-135, Nefotie Neketa; 78-146, Frank Stickwan; 78-175, Ruth E. Venes (Deceased); 78-181, Harlan R. Adkinson; 78-250, May J. Colberg; 78-251, Elsie Stickwan; 78-252, Vera Angason; 78-265, Louise M. Maxie; 78-320, Matilda Titus; 79-398, Elias Venes; 78-415, Margaret I. Sirilo; 78-424, Emma Stuart; and 78-520, Margaret Nick Cooke.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for further action consistent herewith.

James L. Burski
Administrative Judge

We concur.

Frederick Fishman
Administrative Judge

Newton Frishberg
Chief Administrative Judge.

APPENDIX

<u>IBLA No.</u>	<u>Allotment Applicant</u>	<u>Allotment Application</u>	<u>State Sel.</u>
77-328	Steve Sarakovikoff	AA-5954 A-058732	A-057388
77-502	Arnold Oskolkoff	AA-6998 A-050912	A-050910
	Mary C. Pavil	F-16844	F-905
78-134	Edward M. Stevenson	F-16167	F-905
78-135	Nefotie Neketa	AA-6158	AA-5333
78-146	Frank Stickwan	AA-2939	A-051380
78-169	Dan Charles	F-18319	F-905
	Frederick Charles	F-16132	F-905
	Nancy M. Andrew	F-16126	F-905
	Albert C. Romer, Jr.	F-16193	F-905
78-175	Ruth E. Venes (Deceased)	F-16170	F-905
78-181	Harlan R. Adkinson	AA-5794	A-054332
78-250	May J. Colberg	AA-7361 A-058732	A-057388
78-251	Elsie Stickwan	AA-5929	AA-4790
78-252	Vera Angason	AA-6214	A-053268
78-265	Louise M. Maxie	F-16151	F-905

78-320	Matilda Titus	F-034718	F-026807
		F-026989	
78-321	Morrie Secondchief	AA-5837	AA-4805
78-322	Fannie Charles	F-17468	F-905
78-323	Alexie A. Albrite	F-16125	F-905
78-398	Elias Venes	F-16165	F-905
78-412	Lucy Frank	F-034707	F-026811
		F-027968	
		F-028018	
78-414	Andrew Hunter	F-16143	F-905
78-415	Margaret I. Sirilo	F-16164	F-905
78-417	Alice G. Larson	F-13463	F-024519
78-418	Heirs of Peter Jimmie	F-034708	F-026792
78-424	Emma Stuart	F-16908	F-905
78-425	Macarlo Christensen	AA-7351	AA-5235
78-436	Fannie Jacob	AA-7293	A-054326
78-520	Margaret Nick Cooke	F-15591	F-905
78-559	Ben T. Charles	F-13966	F-905
78-560	Peter Charles	F-1682	F-905
78-637	George N. Jacobs	F-16145	F-905
	Grace Lieb	F-15765	F-905
78-649	Nellie Collidge	AA-7286	A-054326
79-65	Fred Hurley	AA-7767	AA-6849
79-70	Harry J. Mann	AA-8215	A-050580
		A-060527	
		A-058731	
	Julia Mann	AA-8222	A-050580
		A-060527	
		A-058731	

79-95	Charlie Nalay	AA-7853	A-054546
		AA-6854	
		AA-6855	
79-98	Alfred Frank	F-034707	F-026809
		F-026829	
		F-026830	
79-145	Frank W. Chaney	F-18060	F-905

